

# *I L L U S T R A T O R S '* **P A R T N E R S H I P**

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## **Statement of Brad Holland Founding Board Member Illustrators' Partnership of America**

### **Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary U.S. House of Representatives**

**March 29th, 2006**

#### **Re: Oversight Hearings on Remedies for Small Copyright Claims**

Chairman Smith, Ranking Member Berman, members of the Subcommittee: My name is Brad Holland. I've been a freelance artist since I was 17 and I'm here to represent the Illustrators' Partnership of America. The IPA is the outgrowth of a grassroots movement started by artists in 2000 for the specific purpose of adapting our cottage industry to the challenges of the digital era. In that capacity, we filed a submission last year to the Orphan Works Study. It was endorsed by 42 international arts organizations, representing a broad spectrum of popular artists, fine artists, medical and architectural illustrators, cartoonists and educators who work in the U.S. and overseas. The Illustrators' Partnership is a non-profit, self-funded organization and an associate member of the International Federation of Reproduction Rights Organizations. I'm pleased to have the opportunity to say a few words about the subject of Remedies for Small Copyright Infringement Claims.

Wherever possible, artists have attempted to work on a traditional business model. Our work is commissioned by clients to whom we license *initial rights* for one-time usage for an agreed-upon price. Most artists retain their *supplementary rights*, which with the advent of the digital era, have been recognized as a potential stream of income – and therefore a contested prize - for any party that can obtain access to them.

Now comes a proposal that risks transferring a vast body of those rights into an orphan works limbo by legalizing the infringement of any work whose creator is said to be hard to find. This would harm artists and photographers disproportionately because images are often published without identifying information, signatures may be illegible and information can be removed by others. We've been told that this committee plans

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rights holders little or no compensation for the work they solicit, government should not infer that such charitable donations by artists to non-profits reflect the commercial *market* to pass Orphan Works legislation quickly, but will consider the creation of a small claims courts or arbitration mechanism to try to litigate the infringement cases that will follow.

We strongly oppose the creation of such courts. The Orphan Works Report states that a “good faith reasonably diligent search” for a copyright holder will be “a very general standard” defined solely by the users themselves, many of whom may well have an interest in an unsuccessful search for the copyright holder. Absent a settlement by negotiation after the infringement has taken place, the copyright owner’s sole recourse will be to bring an action before the courts.

Copyright law is a Federal law. There are only 11 Federal Circuits in the country with 97 U.S. District Courts. Would copyright holders have to travel to one of them every time we need to file a small dollar infringement claim? If so, we wouldn’t be able to add travel and lodging expenses. And under the proposed “limitations on remedies,” the copyright owner could not obtain court costs or attorneys’ fees, not even if the work had been pre-registered. The Orphan Works amendment virtually guarantees that the cost of suing an infringer would exceed whatever sum the copyright owner could recover in a successful small claims action.

By “limiting remedies,” the Orphan Works amendment will create a no-fault license to infringe. Let’s look at a hypothetical small claims action that I might be obliged to bring in the future.

In the 1990’s, I licensed a series of pictures for one-time use in a corporate annual report. Copyright notice and credits are most often omitted by art directors for annual reports, and almost always for advertisements notwithstanding the wishes of the artist to preserve his credit. I registered my copyright in the work as part of a group registration, the title of which was based on the annual report. I subsequently licensed some of these pictures for exclusive use in various ads in the United States, and I make it a practice never to license my work for inexpensive or distasteful products.

But let’s say an infringer finds the annual report. He likes the pictures, sees no credit, and does a “good faith” search that fails to identify me as the owner of the copyright. He begins selling cheap t-shirts bearing my art. Under current copyright law, my remedies would include statutory damages, attorney’s fees, impoundment and injunction for this flagrant infringement because it’s damaged my exclusive right to license my work in high-end markets. But in small claims court my remedy would be what? Reasonable compensation for use of my work on cheap t-shirts. And even this would be limited to whatever maximum the small claims court might set and would be constructed not to deprive the infringer of the profits he made “in reliance” on his so-called failure to locate me.

Without the deterrent of statutory damages and attorneys fees – and without a permanent injunction against repeat offenses by the same t-shirt seller, this experience would now act as an incentive for the infringer to exploit other uncredited (and therefore,

effectively orphaned) images by other artists. He's discovered that infringing art is just a rational business decision. In turn, this would inspire yet other infringers.

This clearly violates the Three-step test of the Berne Convention, which states that exceptions to an author's exclusive rights should apply only to certain special cases, should not conflict with the author's normal exploitation of the work and should not prejudice the author's legitimate interests. As legal scholars Jane Ginsburg and Paul Goldstein stated in their submission to the Orphan Works Study:

"Compliance with Berne/TRIPs is required by more than punctilio; these rules embody an international consensus of national norms that in turn rest on long experience with balancing the rights of authors and their various beneficiaries, and the public. *Thus, in urging compliance with these technical-appearing rules, we are also urging compliance with longstanding practices that have passed the test of time.*" 1., p. 1, OWR0107-Ginsburg-Goldstein (emphasis added)

Creating a new form of legalized infringement without statutory remedies - even for registered copyrights - and offering a small claims court as a solution to the wave of infringements that will result is not a workable approach. It will only serve to legitimize the taking of our copyrights. For these and other reasons, we would respectfully ask this committee to consider the negative effects that OW legislation will have on free market transactions. The attempt to lessen the damage by adding the burden of a small claims court to our overloaded federal judiciary is simply not a viable approach.